



THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Not Reportable
Case No: PR265/22

In the matter between:

PREMIER, EASTERN CAPE PROVINCE

First Applicant

DIRECTOR GENERAL: OFFICE OF THE PREMIER

Second Applicant

and

SONWABO MBANANGA

Respondent

Heard: In Chambers

Delivered: 4 April 2025

JUDGMENT:

CONDONATION AND APPLICATION FOR LEAVE TO APPEAL

MAKHURA, J

[1] The respondent applies for leave to appeal the whole of the judgment and order handed down by this Court on 28 May 2024. Simultaneously, the respondent applies for condonation for the late delivery of the application.

[2] It is not in dispute that the judgment was sent to the respondent's attorneys of record only on 15 October 2024, four and half months after the date of judgment and after it was sent to the applicants' attorneys of record. The Court has since established that the email address used to send the judgment to the respondent's attorneys of record was incorrect, which meant that the judgment did not reach the respondent's attorneys on 28 May 2024. Therefore, the date of receipt of the judgment is 15 October 2024, when the judgment was sent to the respondent's attorneys by the applicants and the 15-day period to apply for leave to appeal expired on 5 November 2024.

[3] The application for leave to appeal, though dated 8 January 2025, was filed on 31 January 2025. The delay is calculated from 6 November 2024 to 15 December 2024 and 15 January 2025 to 31 January 2025. This is a period of more than seven weeks. Whilst the delay is substantial, it is not excessive. I have considered the application and the opposition and considering primarily the length of delay, I am of the view that it is in the interest of justice to grant the application for condonation.

[4] Applications for leave to appeal are regulated in terms of section 17 of the Superior Court Act.¹ I have considered the grounds upon which the respondent seeks leave to appeal. The main judgment has addressed in detail the delay in bringing the review application, the reasons for declaring the impugned decision irregular, irrational and unlawful, and the reasons for reviewing and setting it aside. The Court also addressed the issue of the remedy.

¹ Act 10 of 2013. Section 17(1) provides that: *"Leave to appeal may only be given where the judge or judges concerned are of the opinion that –*

(a) (i) *the appeal would have a reasonable prospect of success; or*
(ii) *there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration...*"

[5] The only 'new' issue raised by the respondent is his reliance on two judgments of this Court penned by Meyerowitz AJ in *Premier, Eastern Cape Province & another v Tikayo*² (*Tikayo*) and *Nxumalo & others v Gauteng Department of Sports, Arts, Culture & Recreation & another*³ (*Nxumalo*). In both matters, the learned acting judge stated that the state is a juristic person with a 'directing mind'⁴. Relying on these judgments, the respondent contends that the applicants must be held to have had knowledge of the unlawful act from its inception. That is, the former Premier and his Director General at the time had knowledge of the unlawful decision and should have brought the application within a reasonable period of taking such a decision.

[6] The Court made a value judgment on the issue of the delay and considered the facts as pleaded in the application. Paragraph 20 of the main judgment states:

'The application was then launched in November 2022, five and half years since the decision. The applicants have in my view adequately explained when they became aware of the impugned decision, how they became aware of it and that upon becoming aware, they acted with reasonable urgency. It took the applicants from July 2022 when they became aware of the impugned decision to November 2022 to file this application. Whilst the delay since the decision was taken may be over 5 years, it would be disingenuous to expect that the former Premier, who approved the decision which is the subject matter of these proceedings, would have applied to set aside the impugned decision. The circumstances that brought this issue to light is the review of the organisational structure. There are no facts to suggest that the incumbent applicants should have been aware of the alleged irregularity or unlawfulness shortly after their appointment to their respective positions or any time prior to July 2022.'

[7] The Court then held that there was no undue or unreasonable delay and that even if there was, the delay should be overlooked when considering:

² [2024] ZALCPE 47; (2025) 46 ILJ 628 (LC) at para 28.

³ [2024] ZALCJHB 327; (2024) 45 ILJ 2778 (LC).

⁴ *Tikayo* at para 28; *Nxumalo* at para 33.

‘the importance and necessity to address and correct where necessary the unlawfulness, the protection and promotion of the rule of law, the nature of the impugned decision, the prospects of successfully declaring the impugned decision unlawful, and the consequences of setting or not setting the impugned aside consequent to the declaration of unlawfulness.’

[8] It is clear from the above that the main judgment considered the delay from the date of the decision. Those who made the unlawful decision were happy with the decision and had continued with the illegality. However, the applicants did not and took legal steps to undo the unlawful action, which must be commended and not condemned, particularly considering that they acted within a reasonable time after they became aware of the unlawful decision. To expect that the former Premier and his DG to have brought the legality challenge against their decision when they were the ones who took the unlawful decision would be untenable because they either did not see any wrong with their decision or they had knowledge that their decision was wrong but were happy to continue with it regardless.

[9] In my view, the two judgments are of no assistance to the respondent's case. They do not raise any conflicting legal position. The applicants have already started implementing the judgment by reversing the respondent's salary in accordance with the judgment. The appeal would have no prospects of success, and there are no compelling reasons for it to be heard. The application must fail.

[10] In the premises, the following order is made:

Order

1. The late delivery of the application for leave to appeal is condoned.
2. The application for leave to appeal is dismissed.

M. Makhura

Judge of the Labour Court of South Africa

LABOUR COURT